

## Legal Updates & News

### Bulletins

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#### Update: Are Your “Computer Professionals” Really Exempt?

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Employment Law Commentary -- May 2007



Both California law and federal law recognize exemptions for computer professionals from the statutory obligation to pay overtime for hours in excess of 40 hours a week (state and federal) and 8 hours a day (state only). While these exemptions are written broadly, e.g., the federal computer professional exemption purports to include such common job titles as computer programmer, systems analyst, and software specialist, the application of the exemptions has been narrowly construed under federal law and has not been tested under California law. The U.S. Department of Labor (DOL) recently issued an opinion letter concluding that certain IT support specialist positions failed to meet both the administrative and the computer professional exemptions from the overtime pay requirements under the FLSA. DOL Op. Ltr. WHM 99:8653 (Oct. 26, 2006). Shortly after the opinion letter was released, two substantial settlements in California class-action lawsuits involving IT employees were announced. The first settlement was for \$27.5 million and covered approximately 800 Siebel Systems software engineers. The second settlement was for \$65 million and covered approximately 32,000 IBM technical services and IT employees. As these cases demonstrate, IT employees are increasingly at the center of wage and hour litigation.

To avoid misclassification of employees and costly claims for back overtime wages, employers should look past job titles and closely examine the work performed by their computer professionals to determine whether the exemptions apply.

This *Commentary* is meant to provide a basic overview of the “computer professional” exemption under California and federal law and to suggest guidelines for a proper determination of the exempt or nonexempt status of employees in computer-related fields. Moreover, whether persons occupying those jobs qualify under the learned professional and administrative exemptions will also be examined.

#### Computer Professional Exemption

The California and federal computer professional exemptions are largely overlapping, but notable differences exist. See Cal. Labor Code § 515.5; 29 U.S.C. § 213(a)(17); 29 C.F.R. §§ 541.400-401. As explained below, the California exemption has more requirements and exclusions. In general, to qualify for either exemption, employees must (i) meet minimum compensation requirements and (ii) be engaged in certain enumerated job duties.

#### Minimum Compensation Requirements

Under California law, employees must make at least \$49.77 per hour or the annualized full-time salary equivalent. Under federal law, employees must make at least \$27.63 per hour or \$455 a week.

#### Job Duties

Both the California and federal exemptions require employees to be engaged in one or more of the following job duties:

- the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
- the documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

However, California's exemption also requires employees to be (i) highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering and (ii) primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.

Both exemptions expressly exclude:

- employees engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment; or
- employees whose work is highly dependent upon or facilitated by the use of computer software programs and who are skilled in computer-aided design software, but who are not in a computer systems analysis or programming occupation.

However, California's exemption also excludes:

- trainees and employees learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering;
- employees in a computer-related occupation who have not attained the level of skill and expertise necessary to work independently and without close supervision;
- writers engaged in preparing material, such as box labels, documentation, setup and installation instructions, or other similar written information, or content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs; or
- employees engaged in any of the otherwise exempt activities for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

The fact that these required duties and exclusions are broadly and loosely defined makes the application of the exemptions to a diverse professional population difficult. Given that computer professionals are generally well compensated, misclassification can result in costly overtime claims, and pose the potential for large class action wage and hour suits. Accordingly, while the advantages of classifying highly compensated computer employees as exempt are obvious, the employer should take great care in evaluating the employee's exempt status.

### Applying The Computer Professional Exemptions

While the California computer professional exemption has yet to generate informative case law or Labor Commissioner opinion letters, the federal exemption has been the subject of some explication. Given the similarity between the two exemptions, it is possible to make some generalizations on the application of both exemptions based on federal case law and DOL opinion letters. However, it is important to remember that: (i) in California, where the two computer professional exemptions differ, e.g., with respect to the minimum amount of compensation or California's additional requirements or exclusions, the employee must satisfy both exemptions; (ii) the employer bears the burden of defending the classification as exempt; and (iii) all exemptions from overtime will be narrowly construed.

Given these considerations, only a small subset of computer employees will actually qualify for the exemptions. A computer employee is more likely to qualify if he or she is engaged in designing a computer system, documenting the internal processes involved in programming, or systems analysis. The following cases are illustrative:

- *Programmer* engaged in designing and developing programs, conducting intensive research to find out what technical steps were necessary to develop the program, analyzing data processing practices to develop solutions and recommendations for improvement, and writing new or modified code, was *exempt* because job duties involved design, development, or modification of computer programs. *Bergquist v. Fidelity Information Services, Inc.*, 11 WH Cases 2d (BNA) 80 (M.D. Fla. 2005).
- *Technical Writer* engaged in documenting complex computer software life cycle programs and functions, based on and related to user and system design specifications, was *exempt* because her

technical writing was directly related to software engineering, systems analysis, and computer programming, even though she was not a computer systems analyst, computer programmer, or software engineer herself. *Morgan-Chandler v. Consortium of Maryland, Inc.*, 3 WH Cases 2d (BNA) 880 (Md. Cir. Ct. 1996).

In contrast, computer employees that merely provide “support services” to customers or co-workers are not exempt.

- *Customer Training Consultants* engaged in training customers’ employees in specialized computer software; manipulating and modifying software settings and specifications (e.g., toolbars and set-up) to meet customer needs; installing, debugging, troubleshooting, and converting data and testing customers’ equipment, were *not exempt* because their duties did not involve determining hardware, software, or systems functional specifications or designing, developing, analyzing, testing, or modifying computer systems or programs. DOL Op. Ltr. WHM 99:8273 (August 19, 1999);
- see also DOL Op. Ltr. WHM 99:8202 (December 4, 1998).
- *Systems Engineers* engaged in providing support services to customers and designing computer solutions to fit client needs, including analyzing current equipment and software and identifying needs and devising implementation of, and conversion to new systems, were *not exempt* because they did not design, create, or modify the systems or programs. DOL Op. Ltr. WHM 99:8373 (May 11, 2001).
- *IT Support Employee* engaged in maintaining the computer workstation software, responding to “help desk tickets,” troubleshooting, repairing, and network documentation, was *not exempt* because job duties did not involve computer programming, software engineering, or systems analysis. The court also focused on the employee’s lack of degree beyond high school and blue collar uniform. *Martin v. Indiana Michigan*, 9 WH Cases 2d (BNA) 1505 (6<sup>th</sup> Cir. 2004). See also *Hunter v. Sprint Corporation*, 11 WH Cases 2d (BNA) 1581 (D.D.C. 2006) (proficient help desk employee *not exempt*); *Jackson v. McKesson Health Solutions LLC*, 10 WH Cases 2d (BNA) 374 (D. Mass. 2004) (maintaining computer system within predetermined parameters *not exempt* work).

## Learned Profession Exemption

Employers have had mixed success under the learned professional exemption. A primary requirement of this exemption under both California and federal law is that the work performed must require knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from: (i) a general academic education; (ii) an apprenticeship; or (iii) training in the performance of routine mental, annual, or physical processes. See Wage Order 4-2001; 29 C.F.R. §§ 541.301-315.

While two federal courts have found computer programmers to meet this threshold requirement, they did so relying largely on the particular individuals’ educational background and work experience. Specifically, one employee had knowledge of complicated computer languages and a B.S. in mathematics, and the other had an aeronautical engineering degree and approximately ten years’ experience in the programming field. In contrast, where a federal district court examined whether the field of computer programming itself required a prolonged course of study sufficient to meet the exemption, it found it did not. Compare *Zacek v. Automated Systems Corp.*, 541 S.W.2d 516, 518-19 (Tex. Ct. Civ. App. 1976), and *Lawrence v. Carte Blanche Corp.*, No. CV-76-1094-LTL, 1979 U.S. Dist. LEXIS 12224 (C.D. Cal. May 22, 1979), with *Gorman v. Continental Can Co.*, No. 76 C 908, 1986 U.S. Dist. LEXIS 30856 (N.D. Ill. January 3, 1986).

Until recently, the Division of Labor Standards Enforcement (DLSE) had concluded that an advanced degree, above a B.A. or B.S., was necessary to meet the learned profession exemption. However, on December 28, 2006, the DLSE changed its position. The DLSE announced that it was deleting the reference to “above a BA or BS degree” in its Enforcement Policies and Interpretations Manual. This switch is good news for employers of individuals who perform “learned” work, but do not possess a postgraduate degree. Consistent with federal law, California’s learned professional exemption is now available in cases where employees have attained “advanced knowledge” through work experience rather than study.

## Administrative Exemption

Historically, employers have generally enjoyed success in defending their computer employees under the administrative exemption. The 2004 federal regulations added a new provision making it explicit that computer employees may also be exempt under the administrative exemption:

For example, systems analysts and computer programmers generally meet the duties requirements for the

administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer's customers.

29 C.F.R. § 541.402

A primary requirement of the administrative exemption under both California and federal law is that the employee must: (i) perform office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; and (ii) regularly exercise discretion and independent judgment.

Employees in computer-related fields have been found to meet these requirements in the following instances:

- *Computer Programmer/Systems Analyst* who consulted with his employer's customers to determine their specific needs and then modified computer programs — and occasionally devised systems — to meet those needs, debugged customers' computers, and trained the customers' employees, was found to be exempt. *Horne v. Singer Business Machine, Inc.*, 413 F. Supp. 52 (W.D. Tenn. 1976).
- *Staff Assistant in Information Systems Unit* who participated in the design, development, and implementation of an advanced computerized information system, which processed and organized advertising information by the amount and nature of the ads for the New York Times Advertising Department, was found to be exempt. *Massaro v. New York Times*, 28 WH Cases (BNA) 1449 (S.D.N.Y. 1988).
- *Senior Programmer/Analyst* who programmed and designed modifications to computer programs, including modifications to computer programs to be used by customers in running their maintenance operations at industrial facilities, was found to be exempt. *Shillinglaw v. Systems Works*, 1 WH Cases 2d (BNA) 1362 (N.D. Ga. 1993).
- *Operations Manager* who was almost exclusively responsible for overseeing the operation and maintenance of all computer hardware and computer support systems, including the supervision of other employees, ordering supplies, determining what work should be done "in house" and what work should be contracted to outside contractors, and determining what maintenance work had to be done immediately and what could be deferred until it could be performed at a lower cost, was found to be exempt. *McKeever v. J.E. Stowers & Co.*, 29 WH Cases (BNA) 603 (W.D. Mi. 1989).
- *Network Coordinator* who was responsible for the repair and installation of a majority of the employer-hospital's computer equipment, software programming and modifications, negotiations with computer vendors, and computer training, was found to be exempt. *Grevemberg v. North Oaks Medical Center*, 3 WH Cases 2d (BNA) 507 (E.D. La. 1996).
- *Field Engineer* who designed plans for connecting internal clients to the employer's network, oversaw the implementation of those plans, configured data communications equipment, trouble-shot problems on the data network, and installed routers and computer software, was found to be exempt. *Lutz v. Ameritech Corp.*, No. 97-74937, 1998 U.S. Dist. LEXIS 18981 (E.D. Mich. November 10, 1998).
- *One-Man IT Department* who had a wide range of duties, including designing, planning, and implementing projects to connect employees to data network, ordering replacement parts, recommending purchases of new software and hardware, installing software, and repairing equipment for the company's computer users with little or no supervision, was found to be exempt. *Koppinger v. American Interiors, Inc.*, 295 F. Supp. 2d 797 (N.D. Ohio 2003).

In contrast, employees who only engage in the testing or debugging of a computer system (as opposed to the design or development) or who primarily follow established standards for the setup, maintenance, and troubleshooting of computers and networks do not qualify for the administrative exemption. See, e.g., *Lang v. Midwest Advanced Computer Servs. Inc.*, 506 F. Supp. 595 (E.D. Mich. 1981); *Pezzillo v. General Telephone and Electronics Information Syst., Inc.*, 414 F. Supp. 1257 (M.D. Tenn. 1976); *Burke v. County of Monroe*, 2002 U.S. Dist. LEXIS 18597 (W.D.N.Y. September 18, 2002); *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120 (9th Cir. 2002); *Martin v. Indiana Michigan*, 381 F.3d 574 (6<sup>th</sup> Cir. 2004); *Hunter v. Sprint Corporation*, 453 F. Supp. 2d (D.D.C. 2006).

## Conclusion

Under any of the above exemptions, conscientious employers should perform yearly audits to make sure that employees believed to be exempt are indeed performing exempt duties and that their pay is keeping pace with the required minimum compensation. Job descriptions should also be reviewed periodically to ensure that they continue to accurately reflect the duties of a continually changing and evolving position.